## Respondent’s Outline of argument: objections

You (the respondent) may formally object to an unfair dismissal application. You can do this if you think that the Fair Work Commission (the Commission) should not allow the application to proceed. The Commission cannot determine the merits of an unfair dismissal application if it does not have the power to do so under the *Fair Work Act 2009*.

There are a limited number of objections you can raise. This document asks questions about the most common kinds of objections. If you did not raise your objection on the Form F3—Employer's Response to Application for Unfair Dismissal Remedy, you will need to complete a Form F4—Objection to Application for Unfair Dismissal Remedy. You can find this form on the Commission's website [www.fwc.gov.au](http://www.fwc.gov.au).

If you do object, completing this document is an important part of preparing for the conference. **You should only complete the sections that are relevant to your objection(s).**

**If you have not raised an objection to the applicant's unfair dismissal application, you do not need to complete this document.**

### What is an Outline of argument: objections?

Use this document to provide more information about the issues you have raised in your Form F3 or Form F4.

This document provides a summary of the facts that are relevant to the Commission Member deciding whether the applicant (the employee) should be allowed to continue with their unfair dismissal application.

The **Outline of argument: objections** will ensure that you are able to answer the questions the Commission Member will have about your objection at the conference.

More information can be found in the Commission's [Unfair Dismissal Guide 5: Objecting to an application](http://www.fwc.gov.au/documents/documents/factsheets/Guide_5_ObjectiontoApp.pdf).

### What to do with your completed Outline of argument: objections?

Once all your documents are completed, make sure you send a copy to both the Commission and the applicant (the employee). The documents should be sent to:

1. the postal or email address of the applicant as set out in their F2—Unfair dismissal application, and
2. the postal or email address of the chambers of the Member as set out in the requirements.

On the day of the conference, make sure you bring a copy of all the material that has been lodged by you and the employee (the applicant).

Crosscheck the information you have put in your **Outline of argument: objections** with the information in your **Outline of argument: merits** and **Statement of evidence**.

### Matter details

|  |  |
| --- | --- |
| **Matter number** (e.g. U2015/12345) |  |
| **Applicant** (the employee) |  |
| **Applicant’s representative** (if any) |  |
| **Respondent** (you, the employer) |  |
| **Respondent’s representative** (if any) |  |
| **Date of conference or hearing** |  |

### Index of objections

Tick the box next to the objection you identified in your Form F3 or Form F4. There may be more than one. Complete the questions in the applicable sections.

|  |  |  |
| --- | --- | --- |
| **Options** | **Tick box** | **Section of form** |
| The application was made out of time (the application was not made within the 21 day time limit) |  | Complete Section 1 |
| The applicant (the employee) did not work for you for long enough (i.e. they did not serve the minimum employment period) |  | Complete Section 2 |
| Your business is a 'small business' (has fewer than 15 employees) and the dismissal complied with the Small Business Fair Dismissal Code |  | Complete Section 3 |
| The dismissal was a case of genuine redundancy |  | Complete Section 4 |
| The applicant (the employee) was not dismissed |  | Complete Section 5 |
| The applicant (the employee) was not your employee (e.g. they were a contractor) |  | Complete Section 6 |
| You were not the applicant's employer (e.g. they were employed by someone else) |  | Complete Section 6 |
| The applicant's (the employee's) earnings were more than the high income threshold and he/she was not covered by a modern award or enterprise agreement |  | Complete Section 7 |
| The applicant (the employee) has already made another application about their dismissal |  | Complete Section 8 |

### Section 1—The application was made out of time

#### You, the respondent (the employer), say that the unfair dismissal application was not made within 21 days after the dismissal took effect. **Answer the questions in this section.**

#### **1a. When did you notify the applicant (the employee) of the dismissal?** (I.e. What date did you tell them?)

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#### **1b. How did you notify the employee of the dismissal?** (E.g. verbally (face to face, by telephone), letter, text message.)

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#### **1c. When did the dismissal take effect?** (I.e. What date?)

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#### **1d. Was the application made within 21 days of when the dismissal took effect?**

#### **Yes**—End of Section 1

**No**—Go to question 1e

#### **1e. Did the employee take any steps to dispute the dismissal with you?**

#### **No**—Go to question 1f

**Yes**—Provide details below

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|  |

#### **1f. Has the lateness of the application caused any unfairness between this employee and any other employee or former employee in a similar position?**

#### **No**—Go to question 1g

**Yes**—Provide details below

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#### **1g. Has the lateness of the application caused the business any disadvantage or unfairness?**

#### **No**—Go to question 1h

**Yes**—Provide details below

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#### **1h. Why do you think that the dismissal was fair?**

Please use numbered paragraphs or dot points.

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| --- |
| 1.  2. |

*End of Section 1*

### Section 2—The applicant did not serve the minimum employment period

#### You, the respondent (the employer), say that the applicant (the employee) did not work for you for long enough and did not serve the minimum employment period. **Answer the questions in this section.**

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| --- |
| **About the minimum employment period**The Commission does not have jurisdiction to hear the merits of an unfair dismissal application if the applicant (the employee) has not completed a minimum employment period of at least **6 months**, or **12 months** in the case of a 'small business' employer. A small business is an employer with **fewer than 15 employees**.Any period of service as a casual does not count when calculating the period of service unless the casual employee was employed on a regular and systematic basis, and during the period of employment the employee had a reasonable expectation of continuing employment on that basis. **Related legislation** Section 384 of the *Fair Work Act 2009*  When calculating the number of employees, the count will include the applicant (the employee), anyone else whose employment was terminated at the same time as the applicant, all full-time and part-time employees and casuals who work on a regular and systematic basis. The count includes all associated entities of the business—this may include other businesses that you own.  **Related legislation** Section 23 and section 383 of the *Fair Work Act 2009*  The period of service must be continuous. Certain periods do not count towards the minimum period of service. These include:   * unauthorised absences * unpaid leave * unpaid authorised absences.   Sometimes when there has been a transfer of business, service with the first employer may count as service with the second employer.  **Related legislation** Section 22 of the *Fair Work Act 2009* |

#### **2a. When did the applicant (the employee) start working for you?**

(I.e. What date?)

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| --- |
|  |

#### **2b. What date did you give the employee their notice of dismissal?**

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#### **2c. What date did the dismissal take effect?**

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#### **2d. Calculate the period of time from the date the employee started their employment** (question 2a) **and whichever is the earlier of:**

* **the date you gave the employee their notice** (question 2b) **and**
* **the date the dismissal took effect** (question 2c)

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#### **2e. Was the employee employed:**

#### **Full-time**—Go to question 2i

#### **Part-time**—Go to question 2i

#### **Casual**—Go to question 2f

#### **A combination or casual and full-time or part-time**—Go to question 2f

#### **2f. How long was the employee a casual for?**

(E.g. the whole time they were employed, three months at the start of employment, for the last 12 months of employment. Specify dates.)

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*Now go to question 2h*

#### **2g. During the employee’s time as a casual, were they employed on a regular and systematic basis?**

#### **No**—Provide details below

#### **Yes**—Go to question 2i

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#### **2h. During the employee’s time as a casual, could they have reasonably expected that they would continue to work on a regular and systematic basis?**

#### **No**—Provide details below

#### **Yes**—Go to question 2i

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#### **2i. Did the employee have any periods of unauthorised absence, unpaid leave or unpaid authorised absence?**

#### **Yes**—Provide details below

#### **No**—Go to question 2j

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#### **2j. Was the employee employed continuously during their employment with you?**

#### **No**—Go to question 2l

#### **No**—Go to question 2k

#### **2k. What were the employee’s continuous period(s) of employment with your business?** (Provide dates, including breaks in service)

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| --- |
| **Related legislation** Section 22 of the *Fair Work Act 2009* |
|  | |

#### **2l. Did the employee’s employment with the business change over time?** (E.g. the business changed hands, the employee’s employment transferred from one employer to another, the employee worked for the business a number of times.)

#### **Yes, there was a transfer of business**—Go to question 2m

#### **Yes, there was another kind of change**—Provide details below, then go to question 2t

#### **No**—Go to question 2u

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|  |

#### **2m. Did the employee transfer from their previous employer (first employer) to the new employer (you the respondent, the second employer) under a transfer of business?**

#### **No**—Go to question 2q

#### **Yes**—Go to question 2n

#### **2n. What date did the employee finish working for the first employer?**

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#### **2o. What date did the employee start working for you, the second employer?**

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#### **2p. What date did the employee’s employment with you finish?**

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#### **2q. Were the first employer and your business ‘associated entities’?**

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| --- |
| **Related legislation** Section 50AAA of the *Corporations Act 2001* |

#### **Yes**—Go to question 2s

#### **No**—Go to question 2r

#### **2r. Explain how they were not associated entities?**

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#### **2s. Was the work that the employee did for the first employer the same or mostly the same as the work they did for you?**

#### **No**—Provide details below

#### **Yes**—Go to question 2t

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#### **2t. Did you inform the employee in writing before they started employment with you that their service with the first employer would not be recognised?**

#### **Yes**

#### **No**

#### **2u. Did your business have fewer than 15 employees at the time that this employee (the applicant) was dismissed?**

#### **No**—End of Section 2

#### **Yes**—Go to question 2v

#### **2v. List the names of the employees who were employed at the time when the employee (the applicant) was dismissed, including their employment status.**

|  |
| --- |
| Include the applicant, anyone else whose employment was terminated at the same time, all **full-time**, **part-time** and **casual employees employed on a regular and systematic basis**, including those employees in any related bodies corporate of your business—this may include other businesses that you own. |

| **No.** | **Name of employee** | **Employment status at the time of the applicant’s dismissal** (i.e. full-time, part-time or casuals employed on a regular and systematic basis) |
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| 14. |  |  |
| 15. |  |  |

#### **2w. Did you leave out any casuals employed by the business in the list at question 2v?**

#### **No**—End of Section 2

#### **Yes**—Go to question 2x

#### **2x. Explain why you think the casuals you left out of your list were not employed on a regular and systematic basis.**

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*End of Section 2*

### Section 3—The respondent (the employer) is a small business and the dismissal complied with the Small Business Fair Dismissal Code

#### You, the respondent (the employer), say that your business is a small business as defined by the *Fair Work Act 2009* and that the dismissal complied with the Small Business Fair Dismissal Code. **Answer the questions in this section.**

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| **About the Small Business Fair Dismissal Code**A dismissal is not unfair if the employee was employed by a small business and the employer has complied with the [Small Business Fair Dismissal Code](https://www.fwc.gov.au/job-loss-or-dismissal/unfair-dismissal/rules-small-business-owners). **Related legislation** Section 23 and section 385 of the *Fair Work Act 2009* |

#### **3a. Is your business a ‘small business’?** (I.e. Did the business have fewer than 15 employees, including yourself if you’re an employee of the business and the employee who you dismissed, at the time of the dismissal?)

#### **Yes**—Go to question 3b

#### **No**—End of Section 3

#### **3b. List the names of the employees who were employed at the time when this employee (the applicant) was dismissed, including their employment status.**

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| Include the applicant, anyone else whose employment was terminated at the same time, all **full-time**, **part-time** and **casual employees employed on a regular and systematic basis**, including those employees in any related bodies corporate of your business—this may include other businesses that you own. |

| **No.** | **Name of employee** | **Employment status at the time of the applicant’s dismissal** (i.e. full-time, part-time or casuals employed on a regular and systematic basis) |
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| 13. |  |  |
| 14. |  |  |
| 15. |  |  |

#### **3c. Did you leave out any casuals employed by the business in the list at question 3b?**

#### **Yes**—Go to question 3d

#### **No**—Go to question 3e

#### **3d. Explain why you think the casuals you left out of your list were not employed on a regular and systematic basis.**

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#### **3e. Did you comply with the Small Business Fair Dismissal Code when you dismissed the employee?**

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| **Related legislation** [Small Business Fair Dismissal Code](https://www.fwc.gov.au/job-loss-or-dismissal/unfair-dismissal/rules-small-business-owners) |

#### **Yes**—Explain below what you did to comply with the Small Business Fair Dismissal Code

#### **No**—End of Section 3

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*End of Section 3*

### Section 4—The dismissal was a case of genuine redundancy

#### You, the respondent (the employer), say that the dismissal was a case of genuine redundancy. **Answer the questions in this section.**

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| **About genuine redundancy**A dismissal is not unfair if it was a case of genuine redundancy in accordance with the legislation. **Related legislation** Section 385 and section 389 of the *Fair Work Act 2009* |

#### **4a. Do you still need someone to do the employee’s job?**

#### **No**—Provide details below, then go to question 4b

#### **Yes**—Go to question 4b

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#### **4b. Have there been changes in the operational requirements of the business?**

#### **Yes**—Provide details below, then go to question 4c

#### **No**—Go to question 4d

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#### **4c. Do you no longer required the employee’s job to be done by anyone because of the changes to the operational requirements of the business?**

#### **No**—Provide details below, then go to question 4d

#### **Yes**—Go to question 4e

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#### **4d. What discussions, if any, did you have with the employee about the changes in the operational requirements of the business and the effect they would have on their job?**

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#### **4e. Was the employee covered by an enterprise agreement of a modern award?**

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| To find out whether the applicant was covered by a modern award or an enterprise agreement, visit the [Fair Work Ombudsman’s website](http://www.fairwork.gov.au)**.** |

#### **Yes**—Provide details below, then go to question 4g (e.g. include the full name and identification number of the award or agreement)

#### **No**—Go to question 4g

#### **Not sure**—Go to question 4g

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#### **4f. Does the enterprise agreement or modern award require you to consult with your employees about redundancy?**

#### **Yes**—Provide details below, then go to question 4g (e.g. include details of the clause(s) that requires you to consult)

#### **No**—Go to question 4g

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#### **4g. Did you consider the possibility of moving the employee into another position, either within the same business or in an associated business?**

#### **Yes**—Explain below what options there were for moving the employee and why it didn’t happen

#### **No**—End of Section 4

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*End of Section 4*

### Section 5—The applicant was not dismissed

#### You, the respondent (the employer), say that the applicant (the employee) was not dismissed. **Answer the questions in this section.**

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| **About dismissals**The Commission does not have jurisdiction to hear the merits of an unfair dismissal application if, according to the legislation, the applicant has not been ‘dismissed’. **Related legislation** Section 386 of the *Fair Work Act 2009* |

#### **5a. Did you end the applicant’s (the employee’s) employment?**

#### **Yes**—Go to question 5e

#### **The employee resigned**—Go to question 5b

#### **The employee was demoted**—Go to question 5f

#### **The employee was made redundant**—End of Section 5. Complete Section 4.

#### **5b. When and how were you notified of the employee’s resignation?**

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#### **5c. To the best of your knowledge, why did the employee resign?**

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#### **5d. Describe the circumstances leading up to the employee’s resignation.**

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*End of Section 5*

#### **5e. Why did you end the employee’s employment?**

#### **It was the end of a training arrangement**—Provide details below

#### **It was the end of a season**—Provide details below

#### **It was the end of a specific task**—Provide details below

#### **It was the end of a period of time specified on a contract**—Provide details below

#### **Other**—Provide details below

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#### **5f. Did the demotion involve a significant reduction in pay or duties?**

#### **Yes**—Provide details below

#### **No**—End of Section 5

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#### **5g. Why did you demote the employee?**

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*End of Section 5*

### Section 6—The applicant was not an employee, or the respondent was not the applicant’s employer

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| **About employees and employers**The Commission does not have jurisdiction to hear the merits of an unfair dismissal application if it was lodged by a contractor because unfair dismissal provisions in the *Fair Work Act 2009* only apply to [national system](https://www.fwc.gov.au/apply-or-lodge/who-australias-national-workplace-relations-system-covers) employees. **Related legislation** Section 380 of the *Fair Work Act 2009*  For more information on the differences between employees and contractors, visit the [Fair Work Ombudsman’s website](http://www.fairwork.gov.au).  The Commission does not have jurisdiction to hear the merits of an unfair dismissal application if the applicant was not employed by the respondent. |

#### **6a. Was the applicant a contractor?**

#### **Yes**—Explain below why you believe the applicant was a contractor and not an employee

#### **No**—Go to question 6b

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#### **6b. Was the applicant (the employee) a labour hire employee?** (I.e. Was the applicant hired and paid by a labour hire company?)

#### **Yes**—Explain why you believe the applicant was a labour hire employee

#### **No**—End of Section 6

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*End of Section 6*

### Section 7—The applicant was not covered by a modern award or an enterprise agreement and his/her earnings exceeded the high income threshold

#### You, the respondent (the employer), say that the applicant (the employee) earned over the high income threshold and was not covered by a modern award or an enterprise agreement. **Answer the questions in this section.**

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| **About the high income threshold**The Commission does not have jurisdiction to hear the merits of an unfair dismissal application if the applicant earned more than the high income threshold and was not covered by a modern award or an enterprise agreement.To find out whether the employee was covered by a modern award or an enterprise agreement, visit the [Fair Work Ombudsman’s website](http://www.fairwork.gov.au). **Related legislation** Section 382(b) of the *Fair Work Act 2009* and Regulation 2.13 of the *Fair Work Regulations 2009* |

#### **7a. Was the applicant (the employee) covered by a modern award?**

#### **Yes**—Write the full name of the modern award below

#### **No**—Go to question 7b

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#### **7b. Was the employee covered by an enterprise agreement?**

#### **Yes**—Write the full name and identification number of the enterprise agreement below

#### **No**—Go to question 7c

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#### **7c. Were the employee’s annual earnings, including non-monetary benefits, more than the high income threshold per year?**

#### **Yes**—Provide details below

#### **No**— Provide details below

Set out the components of the employee’s earnings as well as any non-monetary benefits that you are including in your estimate.

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*End of Section 7*

### Section 8—The applicant has already made an application in respect of this dismissal

#### You, the respondent (the employer), say that the applicant (the employee) has already made an application in respect of the dismissal. **Answer the questions in this section.**

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| **About multiple actions** The Commission may not have jurisdiction to hear the merits of an unfair dismissal application if another application has already been made under the *Fair Work Act 2009* or under another law in relation to the dismissal, and the earlier application has not been withdrawn or dealt with.  **Related legislation** Section 725 of the *Fair Work Act 2009* |

#### **8a. Has the applicant (the employee) already made an application to the Fair Work Commission, or another tribunal or court, about this dismissal?**

#### **No**—End of Section 8

#### **Yes**—Provide details below. Include information about the separate application(s), including the court or tribunal that it has been lodged with and whether or not it has been determined or withdrawn.

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*End of Section 8*

### Legal advice

The Commission cannot provide legal advice.

As part of the unfair dismissal application process, parties may choose to obtain their own independent legal advice.

There are community legal centres in each state and territory. Community Legal Centres Australia legal help page ([clcs.org.au/index.php/findlegalhelp](https://clcs.org.au/index.php/findlegalhelp)) can assist with finding the nearest community legal centre. Please note that Community Legal Centres Australia does not itself offer legal advice.

### Further information

For eligibility information, refer to the Unfair dismissal—Am I eligible to apply? page on the Commission's website ([www.fwc.gov.au/job-loss-or-dismissal/unfair-dismissal/about-unfair-dismissal/check-eligibility-unfair-dismissal](http://www.fwc.gov.au/job-loss-or-dismissal/unfair-dismissal/about-unfair-dismissal/check-eligibility-unfair-dismissal)).

You can also refer to the full set of unfair dismissal guides available on the Unfair dismissal page ([www.fwc.gov.au/job-loss-or-dismissal/unfair-dismissal](http://www.fwc.gov.au/job-loss-or-dismissal/unfair-dismissal)) of our website.

1. Overview of the unfair dismissal laws

2. Flowchart on the process

3. Making an application

4. Responding to an application

5. Objecting to an application

6. Preparing for conciliation

7. Preparing for a conference or hearing

8. Frequently asked questions

9. Glossary of common terms

The Unfair Dismissals Benchbook can also assist parties lodging or responding to unfair dismissal applications ([www.fwc.gov.au/benchbook/unfair-dismissals-benchbook](http://www.fwc.gov.au/benchbook/unfair-dismissals-benchbook)).

If you require further information or help, please refer to the Contact us page on the Commission's website ([www.fwc.gov.au/about-us/contact-us](http://www.fwc.gov.au/about-us/contact-us)).

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This guide is not intended to be comprehensive. It is designed to assist in gaining an understanding of the Fair Work Commission and its work. The Fair Work Commission does not provide legal advice.